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SUMMARY

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Charles Doyle
Senior Specialist in
American Public Law

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The National Gambling Impact Study Commission reported wide-spread sports gambling on college campuses and, although closely divided, recommended that gambling on collegiate and amateur athletic events be completely outlawed. As in the 106th Congress, the sports gambling measures introduced thus far in this Congress fall into two categories: those that impose a complete ban on amateur sports gambling (S. 718 (McCain et al.), H.R. 1110 (Graham et al.)), and those that seek to reduce campus gambling and illegal sports gambling (S. 338 (Ensign et al.), H.R. 641 (Gibbons et al)). This is a sketch of those proposals and an abridged version of CRS Report RL30954, *Sports Gambling in School: A Legal Analysis of Proposals to Strengthen Federal Prohibitions*.

Background

There are more than a few federal gambling laws. Most, but not all, are designed to reenforce state gambling laws. Several refer to sports gambling and others have sufficient breath to encompass it. For example, the Wire Act, 18 U.S.C. 1804, which proscribes the interstate transmission of bets or gambling information, speaks of gambling on "sporting events and contests" specifically. The Travel Act, 18 U.S.C. 1952, which criminalizes interstate travel to conduct the affairs of various unlawful activities, and the federal prohibition on illegal gambling business, 18 U.S.C. 1955, on the other hand, do not mention sports gambling as such but reach illegal gambling generally.

Not all federal gambling laws impose criminal penalties. The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701-3704, for instance, merely entitles the Attorney General and various sports organizations to a federal court order enjoining governmental entities and their contractors from sponsoring, licensing, or engaging in sports gambling. And although the lottery broadcast ban, 18 U.S.C. 1305, carries criminal penalties, it is enforced primarily through the regulatory authority of the Federal Communications Commission.

Since federal gambling laws have often been crafted to mirror state gambling policies, when gambling policies in the states became more ambivalent so too did federal law. Early recognition of this fact led to the creation of the National Gambling Impact Study Commission, P.L. 104-169, 110 Stat. 1482 (1996). In its final report, the Commission recommended that the state and federal governments act under the presumption that "state governments are best equipped to regulate gambling within their borders with two exceptions – tribal and Internet gambling," but urged that "the betting on collegiate and amateur athletic events that is currently legal be banned altogether," THE NATIONAL GAMBLING IMPACT STUDY COMMISSION: FINAL REPORT, *Recommendations* 3.1, 3.7 (1999). When reporting out sports gambling legislation in the last Congress, the Committees in each house characterized the Commission's sports gambling recommendation as a third exception to the state primacy recommendation.

Both the House Judiciary Committee and the Senate Committee on Commerce, Science and Transportation reported sports gambling proposals favorably, but the 106th Congress adjourned before any further action could be taken. The proposals have been reintroduced in this Congress, however, by Senator McCain (S. 718) and Congressman Graham (H.R. 1110). The Senate Commerce, Science and Technology Committee approved the McCain bill with amendments on May 14, 2001.

Killing Off Grandfathers/Monopolies

S. 718, the Amateur Sports Integrity Act, as introduced consists of two titles. The first, which deals with athletic performance enhancing drugs, is beyond the scope of our discussion. The second essentially replicates the proscriptions of the Professional and Amateur Sports Protection Act, 28 U.S.C. 3701-3704, with respect to Olympic, high school and college gambling but without the exceptions grandfathered into existing law. As a practical matter its impact is to outlaw sports gambling with respect to high school, college or Olympic contests in every state, but its impact would be felt primarily in the only state where such gambling is now legal, Nevada, H.Rept. 106-903, at 2.

The Professional and Amateur Sports Protection Act forbids anygovernmental entity or any of its contractors from sponsoring, operating, licensing or authorizing sports gambling. The Attorney General or aggrieved sports organizations enforce the Act through court orders which enjoin further violations. The Act's prohibitions are inapplicable to sports gambling in states where it

was lawful at the time the legislation was proposed. The exceptions were grounded in a reluctance to apply the proscription retroactively in states where sports gambling had been legalized.

The Senate bill adds its provisions to the chapter of the United States Code that incorporates the United States Olympic Committee, 36 U.S.C. ch. 2205. The House bill,

H.R. 1110 as introduced, in contrast simply amends section 3704. Its effect, however, is the same as the Senate proposal.

Proponents of the two proposals argue that they implement the recommendations of the gambling commission by closing a loophole in existing law, mitigate the threat that gambling poses to the integrity of amateur athletics, and reduce the extent of illegal sports gambling.

Opponents respond that the proposals have a substantial and unfair economic impact on the State of Nevada and one of its principal employers, whose regulated gambling activities do not imperil the integrity, such as it is, of amateur athletics, and that there are effective ways to reduce the extent of illegal sports gambling, an objective the proposals do not achieve. They also argue that the proposals are constitutionally suspect as an impermissible intrusion on state prerogatives and a governmental taking without just compensation.

There is also the suggestion that the proposals are incompatible with the principles of federalism, perhaps unconstitutionallyso. Whatever their congruitywith the principles of federalism, the proposals do not appear to exceed Congress' legislative prerogatives under the commerce clause. As *Lopez* explained and *Morrison* confirms, Congress' commerce clause powers extend to activities that have a substantial affect on interstate commerce, and to economic enterprises which even if intrastate have an impact on commerce. Sports gambling, particularly when conducted within a casino in Nevada, appears to fit comfortably among the examples of economic activity which the Supreme Court finds within Congress' power under the commerce clause.

Although a matter lies within Congress' authority under the commerce clause, efforts to exercise that authority may fail if inconsistent with the principles of federalism reflected in the Tenth Amendment. Thus, Congress in the name of commerce may not compel a state to enact a federal regulatory scheme nor compel the state or its officers to enforce such a scheme. Congress within the commerce power may regulate state activities, however, as long as it does not compel the states to exercise regulatory authority over others. For instance, the Drivers' Privacy Protection Act, 18 U.S.C. 2721- 2725, bans the state departments of motor vehicles from releasing certain motor vehicle registration information (information which some have traditionally sold) except for federally approved purposes. The Act survived federalism challenge based on *New York and Printz* because it was deemed to constitute the regulation of state activity not the control of state regulation of the activities of others.

The prohibitions against state sponsorship or operation of sports gambling activities are clearly an example, like the Supreme Court cases in *Condon and Baker*, of federal regulation of state activity. Whether the licensing prohibition merely constitutes a ban on state activity or crosses the line as a federal command that the state regulate its citizenry per federal instruction is a much closer question.

Of course, the Eleventh Amendment comes to mind whenever a statute, enacted under a claim of commerce clause powers, purports to vest federal court jurisdiction for a private suit against a state or its officials. The Eleventh Amendment proscription, however, is subject to a limitation which permits some injunctive relief against state officials for violations of federal law, *Ex parte Young*, 209 U.S. 123 (1908). This seems to be precisely what the proposals contemplate.

Critics face no less formidable obstacles in any effort to establish a takings clause claim. As a threshold matter, "a party challenging governmental action as an unconstitutional taking bears a substantial burden," for "not every destruction or injury to property by governmental action has been held to be a taking in the constitutional sense," *Eastern Enterprises v. Apfel,* 524 U.S. 498, 523 (1998). In the absence of a physically intrusive taking, "where a regulation places limitations on [property] that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the [property] owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action," *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). When the challenged governmental action occurs within a field of highly regulated activity, like gambling, the task of establishing a taking may be even more daunting, *Eastern Enterprises*, 524 U.S. at 528.

Proponents might well point out that the proposals introduce no new constitutional questions; they merely follow the legislative path established by the Professional and Amateur Sports Protection Act. They might argue that passage of Act suggests that Congress saw no constitutional impediment to enactment of the original statute. Moreover, they may contend that the provision in S. 718 for prompt judicial review of the proposal's constitutionality precludes objection on constitutional grounds.

Study, Prosecution, and Administrative Enforcement

The National Collegiate and Amateur Athletic Protection Act of 2001 (S. 338/H.R. 641) proposes a series of research, prosecutorial and administrative initiatives to eliminate gambling on college campuses and reduce illegal sports gambling. It instructs the Attorney General to establish a coordinating sports gambling task force and authorizes appropriations of $28 million for the task force.

It increases the criminal penalties for sports related gambling so that the penalty for point shaving becomes imprisonment for not more than 10 years instead of not more than 5 years. The maximum penalties for transporting gambling paraphernalia (18 U.S.C. 1953(a)), for conducting an illegal gambling business (18 U.S.C. 1955(a)), and for violations of the Travel Act (18 U.S.C. 1952) also rise from 5 to 10 years when gambling on "any sporting event or contest" is involved. And the maximum term of imprisonment for Wire Act offenses grows from 2 to 5 years.

The proposal calls for Justice Department directed research on the extent of illegal sports gambling by juveniles as well as a multifaceted study on sports gambling with particular emphasis on the college level illegal gambling. It requires colleges receiving federal education funds to implement an illegal gambling reduction program which includes withholding athletically related student aid from those guilty of engaging in illegal gambling.

The proposal ends with a congressional plea to educational and governmental entities as well as to the NCAA (National Collegiate Athletic Association) to develop and execute youth gambling education and prevention programs.

The principal criticism of this Ensign/Gibbons proposal to date is that while its components might constitute a welcome supplement it is no substitute for the McCain- Graham proposal. Unstated thus far, except perhaps in the gaming commission's general recommendation, may be the view that both proposals interject the federal government into a matter appropriately left to the states.

Author Information

Charles Doyle
Senior Specialist in American Public Law

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